IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE

STATE OF MISSOURI,

Respondent,

v.

SHEENA MARR,

Appellant.

DOCKET NUMBER WD78648

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: September 13, 2016

APPEAL FROM

The Circuit Court of Lafayette County, Missouri
The Honorable Dennis A. Rolf, Judge

JUDGES

Division Two: Karen King Mitchell, Presiding Judge, and Cynthia L. Martin and Gary D. Witt, Judges

---

ATTORNEYS

Chris Koster, Attorney General
Richard A. Starnes, Assistant Attorney General
Jefferson City, MO

Attorneys for Respondent,

Amy M. Bartholow, Assistant Public Defender
Columbia, MO

Attorney for Appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
v.	)	**OPINION FILED:**
	)	**September 13, 2016**
SHEENA MARR,	)	
	)	
Appellant.	)	

WD78648 Lafayette County

Before Division Two Judges: Karen King Mitchell, Presiding Judge, and Cynthia L. Martin and Gary D. Witt, Judges

Sheena Marr appeals, following a jury trial, her convictions of first-degree trafficking, § 195.222, and misdemeanor possession of a controlled substance, § 195.202, for which she was sentenced, as a persistent offender, to a total of sixteen years' imprisonment. On appeal, Marr claims that the trial court erred in: (1) overruling her motion to suppress because the investigating officer violated the Fourth Amendment by impermissibly extending the scope of his initial investigation; and (2) failing to *sua sponte* strike the trial judge's spouse from the venire panel for cause because allowing her to serve created the appearance of impropriety.

AFFIRMED.

Division Two holds:

1. There are three categories of police-citizen encounters: (1) an arrest requiring probable cause, (2) an investigative detention requiring only reasonable suspicion based upon specific articulable facts, and (3) a consensual encounter.

2. Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

3. Here, Marr was not subjected to a traffic stop; instead, Officer Logan approached the vehicle, which was voluntarily stopped on the side of a public thoroughfare, in response to a dispatch call for assistance with a stranded motorist. Thus, it began as a consensual encounter.

4. Consensual encounters can become detentions (thereby implicating the Fourth Amendment) if the individual no longer has a reasonable belief that he or she could terminate the encounter or refuse to answer questions. When that occurs, a seizure has taken place and the encounter moves into the second category of an investigatory detention: a *Terry* stop.

5. Reasonable suspicion, which is a less stringent standard than probable cause, is present when a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.

6. Suspicion is reasonable if the officer is able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

7. The officer had reasonable suspicion to detain Marr from the following facts: during his approach to Marr's vehicle, Officer Logan observed the driver make furtive movements toward the floorboard; upon encountering Marr, the officer immediately noticed that she appeared to be under the influence of a stimulant of some kind and that she had the physical appearance of a frequent user of methamphetamine; upon asking for Marr's identification, she handed him a Department of Corrections identification card and indicated that she was on probation for forgery. Both Marr and the driver demonstrated signs of extreme nervousness. In light of Marr's appearance, Officer Logan had reasonable suspicion to believe that she was in violation of one or more of her probationary conditions.

8. The combination of extreme nervousness, apparent drug intoxication, and potential probation violations led Officer Logan to deploy his drug-sniffing dog around the car. And, once the dog alerted, Officer Logan then had probable cause to believe criminal activity was afoot. Thus, the trial court did not err in overruling the motion to suppress.

9. If a venireperson appears to be biased, whether based in fact or on an attorney's "horse sense," the appropriate remedy is for a party to move to strike the venireperson either for cause or peremptorily. We find no persuasive authority suggesting that a court has a duty to *sua sponte* strike a juror merely because the juror is related to the trial judge.

10. When the defendant is aware of facts which would sustain a challenge for cause, he must present his challenge during the *voir dire* examination or prior to the swearing of the jury, otherwise, the point is waived.

11. Though a challenge made for the first time after conviction may be considered for plain error resulting in a miscarriage of justice or manifest injustice, plain error review is waived when counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence.

12. Here, Marr was aware of the relationship between Juror 30 and the trial judge, as the matter was pointed out not only during the State's *voir dire* but also during Marr's questioning when Juror 30, herself, brought it to everyone's attention. Despite knowing of the relationship, Marr sought neither to strike Juror 30 for cause nor to exercise a peremptory strike to remove her from the panel. Instead, when the court announced that Juror 30 would be serving at the trial, Marr announced that she had no objection to the panel selected to serve.

13. If not raised at the first opportunity in the circuit court, a constitutional claim is waived and cannot be raised on appeal. A defendant in a criminal case may expressly or by acts and conduct waive statutory and constitutional provisions conferred for his protection. Even a person convicted by an unconstitutionally composed jury must bring that claim to the attention of the trial court, because the trial court must be given the opportunity to correct error ***while correction is still possible***.

14. Though we find the circumstances here unusual, if any error exists, it could have easily been corrected below if Marr had attempted to strike Juror 30.

15. At most, it seems that if a particular juror's service creates the appearance of impropriety, *the judge* may be subject to disqualification or recusal. And at no point, either below or on appeal, has Marr suggested that recusal was either appropriate or required.

Opinion by: Karen King Mitchell, Presiding Judge September 13, 2016

* * * * * * * * * * * *